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Book Review. The People's Republic of China and the Law of Treaties by Hung-dah Chiu

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Books Noted

THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES. By Hungdah Chiu. Cambridge, Mass.: Harvard University Press. 1972. 172 pages. \$10.00.

THE STUDY OF INTERNATIONAL LAW rests on two fundamental hopes: first, that the nations of the world can agree on principles of international law, and second, that those principles can be used to judge and ultimately regulate the conduct of nations. An evolving acceptance of the legal doctrine, according to this model, corresponds with the incremental establishment of the rule of law for the world of nations. Given this model of a steady growth in consensual principles, scholars in international law ask several basic questions about the People's Republic of China: in particular, what principles of international law do the Chinese leaders profess to follow, and to what extent do these principles diverge from those accepted in the West? The answers to these doctrinal questions will serve to elucidate the prospects for an international law. In addition, the study of Chinese-supported principles of international law has a more immediate practical significance, especially when we examine such topics as the law of treaties. As we increase our ties with China, and as critics question the reliability of the Chinese in keeping treaty commitments, it is important to know what treaty law the Chinese purport to apply. Reliability self-evidently depends on the standard applied to the conduct.

Hungdah Chiu, in *The People's Republic of China and the Law of Treaties*, attempts to ascertain the principles of the law of treaties supported in theory and in practice by the Chinese leaders. He focuses on the second, and more practical, question raised above, but his analysis implicitly asks the first set of questions. From an apparently exhaustive survey of Chinese literature on the law of treaties and a study of actual Chinese treaties, Chiu successfully provides much insight into the topic.

As Chiu shows in some detail, Chinese leaders agree in theory with a considerable portion of the law of treaties articulated by Western scholars. For example, the Chinese procedure for making bilateral treaties, which entails the issue of full powers to diplomatic representatives, negotiation, signature, and ratification, coincides with that followed by Western states.¹ Similarly, China has generally chosen to recognize the continuing validity of all boundary treaties concluded by Chinese governments prior to the Communist victory in 1949.² Moreover, in analyz-

¹ H. CHIU, *THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES* 31 (1972).

² *Id.* at 96.

ing problems of treaties, Chinese writers frequently cite Western doctrine for support and quote major Western treatises, particularly Oppenheim's *International Law*.³ In short, China and the West to a great extent apply the same law of treaties.

However, as Chiu also demonstrates, "where differences exist, they are profound."⁴ Several of these differences merit discussion, both for their own importance and because they suggest some of the problems with Chiu's approach to this subject.

A key divergence in doctrine arises from the Chinese distinction between "equal treaties" and "unequal treaties." Equal treaties, which are to be strictly observed, are those produced by genuine negotiation between or among equal sovereigns.⁵ Unequal treaties, those produced by coercion, are considered void by the Chinese. A typical example of an unequal treaty, according to Chinese writers, is that concluded in 1965 between the United States and Taiwan.⁶ The agreement grants American forces exemptions from taxes and visa requirements, immunity from local jurisdiction over acts committed in the course of official duty, and several other privileges. Another example is the treaty between the Soviet Union and Czechoslovakia signed in 1968, which gave recognition and acceptance to the occupation by Soviet troops. Both examples show the Chinese rejection of treaties which reflect clear inequalities in bargaining power. In addition, they suggest that the concept of unequal treaties can be used to challenge countless treaties, particularly those opposed on other grounds.

It should be noted, however, that at least on a superficial level, the concept of unequal treaties is gaining popularity in the Western world. In particular, the 1969 United Nations conference on the Law of Treaties condemned "the threat or use of pressure in any form . . . by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent."⁷ Still, these principles are considered applicable only to treaties concluded after the issuance of the conference declaration, and thus do not imply approval of China's practice of challenging older treaties. Moreover, a growth in acceptance of the theory does not solve the problem of determining which treaties are in fact termed unequal. This second point, not developed by Chiu, will be discussed below.

³ L. OPPENHEIM, *INTERNATIONAL LAW*, VOL. I (H. Lauterpacht ed. 1955); Vol. II (H. Lauterpacht ed. 1952).

⁴ CHIU, *supra* note 1, at 119.

⁵ *Id.* at 62.

⁶ *Id.* at 65.

⁷ *Id.* at 62.

A second major doctrinal divergence, according to Chiu, is in the perceived effect of a revolutionary change in government on the treaty obligations of a state. Western theory holds that even revolutionary changes in the government or constitution of a state do not invalidate treaties made by predecessor governments. This principle, consistent with the Western emphasis on stability, is clearly rejected by the Chinese leaders despite their acceptance of pre-1949 boundary treaties. Chinese leaders have repeatedly insisted that after a successful revolution all existing treaties must be reexamined and, depending on their contents, rejected, revised, or accepted.⁸

Both these doctrinal points show Chinese disagreement with Western scholars on major issues in the law of treaties, and Chiu clearly and concisely gives the opposing viewpoints. One of the key problems with Chiu's work, however, is that he confines it to this comparative approach to such an extent that his conclusions are often of marginal interest or questionable validity. This problem is exacerbated because, although Chinese writers often quote Western treaties, they do not discuss many aspects of the Western *law* of treaties. For example, Chiu, having stated that Western writers agree that physical coercion against the representatives of a contracting state vitiates the resulting treaty, goes on to say, "No Communist Chinese writers appear to comment on the problem. . . . But, in view of their severe condemnation of coercion or other undue influence exercised against the contracting state itself, *a fortiori* one can safely conclude that they also consider that such acts vitiate a treaty."⁹ If the Chinese disagreed with that principle, it would certainly be worth noting; but in view of the weak evidence Chiu cites, it hardly seems worth mentioning that the Chinese oppose such physical coercion. Another short quotation illustrates the same point. It is at best of marginal significance that, "When the premier of the State Council concludes a treaty with a foreign state, it is not clear whether the issuance of credentials bearing full powers is required."¹⁰

Moreover, as the first example suggests, Chiu's focus on Western comparisons leads to poorly substantiated conclusions about Chinese doctrine. One notable example is Chiu's effort to determine the Chinese position on multilateral treaties concluded prior to revolutionary changes of government. Despite the principle of revolutionary change discussed earlier, Chiu concludes that China apparently regards such treaties as valid. This conclusion is based primarily on China's demand to be seated in the United Nations and several other international groups. In

⁸ *Id.* at 92.

⁹ *Id.* at 30.

¹⁰ *Id.* at 32.

Chiu's words, "Communist China's assertion of rights was necessarily predicated on a recognition of the continuing validity of the treaties establishing these organizations."¹¹ Acceptance of a general principle can hardly be inferred from one action, especially when it is obvious that other political reasons better explain the action. Clearly the United States does not believe in the principle that land treaties merit no respect, despite the historical practice of violating such treaties with American Indian nations. The point is that too often Chiu's zeal for finding Chinese views on all Western principles leads him to draw such questionable inferences from isolated Chinese actions.

Furthermore, Chiu's organization around Western principles inhibits his development of important points in Chinese doctrine, points which he mentions in passing and which have no counterpart in Western thought. Especially noteworthy is the distinction made between "reactionary" and "progressive" governments. Chiu invokes this distinction twice: first, he suggests that "[w]hen two governments are contesting for the control of a state, the government regarded by Communist China as 'reactionary' is thought of as not competent to conclude certain treaties on behalf of that state";¹² and second, he observes that the Chinese may argue that "a reactionary new regime should not have the right to reject treaty obligations contracted by an earlier progressive regime."¹³ Chiu does not explore the implications of this distinction as it relates to treaties in general. In fact, this weakness stems as much from another major problem with Chiu's organization as it does from his emphasis on principles debated in the West.

This problem, not unusual in studies of international law, is that Chiu attempts to artificially separate political realities and legal principles. While he notes certain areas where political expediency apparently explains China's conduct, and discusses doctrines subject to flexible interpretations in practice, he avoids coming to grips with the connection between principles and political realities. Thus, he concludes the book by acknowledging, "the fact that a principle of treaty law is accepted both by Communist China and the West does not guarantee identical application of the principle. . . . [I]n comparison with Western countries, Communist China has shown less concern for purely legal principles than for political factors."¹⁴ This conclusion, regardless of its validity, is wholly unsatisfactory. The author does not explain what political factors are involved and when they are significant, leaving the im-

¹¹ *Id.* at 94.

¹² *Id.* at 27.

¹³ *Id.* at 101.

¹⁴ *Id.* at 120.

pression that Chinese treaties are subject to the vicissitudes of political expediency.

For all nations the law of treaties is part of a hierarchy of accepted principles and values. For example, no nation will support a treaty aimed at its own destruction. Self-preservation takes precedence over the integrity of treaties. If we wish to know the reliability of a nation in respect to treaties, we must know the place of treaty law in the hierarchy of national concerns. Such knowledge, moreover, would help clarify China's decision to apply otherwise ambiguous doctrines, such as that of unequal treaties, which disrupt the stable recognition of treaty validity.

Thus, for example, China's commitment to "progressive" governments over "reactionary" ones may be greater than its commitment to a stable system of treaties. China may place a high value on treaty recognition, but might in some cases place a higher value on its commitment to change. Such doctrines as unequal treaties and revolutionary change of governments may not be just broad and ambiguous principles without some support in the West; they arguably represent keys to the hierarchy of values in China. They help China to accommodate a political commitment to the support of "progressive" regimes.

Whether or not such analysis is valid, it is not enough to argue that political factors adversely affect China's commitment to a law of treaties. Chiu has artificially limited his scope to specific principles of the law of treaties. A more instructive and useful analysis would examine which treaties, between which parties, and covering what substantive points, are likely to be accepted by the Chinese.

Despite the gaps and weaknesses in *The People's Republic of China and the Law of Treaties*, Chiu has at least provided a succinct and informative source of Chinese treaty doctrine. His discussion, moreover, is sufficiently informative to push the reader beyond Chiu's formalistic comparisons and artificial distinctions. In particular, with respect to foreign policy decisions, we must study more than doctrine to assess the Chinese commitment to treaties. But even an analysis of doctrine shows that China and the West currently have rather crucial differences in their respective attitudes toward treaties. Finally, given the ideological and political sources of the differences, Chiu's study once again illustrates the difficulty in building a truly international law of treaties.

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